

Introduced by Senator Stone

February 26, 2015

An act to amend Section 18662 of the Revenue and Taxation Code, relating to taxation.

LEGISLATIVE COUNSEL'S DIGEST

SB 495, as introduced, Stone. Income taxes: withholding: real property sales.

Existing law requires the transferee of a California real property interest, in specified circumstances, to withhold, for income tax purposes, 3 $\frac{1}{3}$ % of the sales price of the property when the property is acquired from either an individual, or a partnership or corporation without a permanent place of business, as specified. Existing law also allows, by election of the transferor, alternative withholding amounts that are not less than the amount of gain required to be recognized under income tax laws multiplied by the corporation tax rate, bank and financial corporate tax rate, the highest personal income tax rate, or the current "S" corporation tax rate plus the highest personal income tax rate, as applicable.

This bill would, in the case of any disposition of a California real property interest in taxable years beginning on or after January 1, 2016, provide that withholding would not be required if a transferor makes a written election, in a form prescribed by the Franchise Tax Board, to remit any tax due with the filing of any required tax return.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 18662 of the Revenue and Taxation Code
2 is amended to read:

3 18662. (a) The Franchise Tax Board may, by regulation,
4 require any person, in whatever capacity acting, including lessees
5 or mortgagors of real or personal property, fiduciaries, employers,
6 and any officer or department of the state, or any political
7 subdivision or agency of the state, or any city organized under a
8 freeholder's charter, or any political body not a subdivision or
9 agency of the state, having the control, receipt, custody, disposal,
10 or payment of items of income specified in subdivision (b), to
11 withhold an amount, determined by the Franchise Tax Board to
12 reasonably represent the amount of tax due when the items of
13 income are included with other income of the taxpayer, and to
14 transmit the amount withheld to the Franchise Tax Board at the
15 time as it may designate.

16 (b) The items of income referred to in subdivision (a) are
17 interest, dividends, rents, prizes and winnings, premiums, annuities,
18 emoluments, compensation for services, including bonuses,
19 partnership income or gains, and other fixed or determinable annual
20 or periodical gains, profits, and income.

21 (c) The Franchise Tax Board may authorize the tax under
22 subdivision (a) to be deducted and withheld from the interest upon
23 any securities the owners of which are not known to the
24 withholding agent.

25 (d) Any person that fails to withhold from any payments any
26 amounts required to be withheld by this section or fails to remit
27 the taxes withheld is liable for the amount specified in Section
28 18668.

29 (e) (1) This subdivision applies to any disposition of a
30 California real property interest by:

31 (A) Any person, other than either of the following:

32 (i) Except as otherwise provided in this subdivision, a
33 corporation, including an entity classified for tax purposes as a
34 corporation under Part 11 (commencing with Section 23001).

35 (ii) Except as otherwise provided in this subdivision, a
36 partnership, as determined in accordance with Subchapter K of
37 Chapter 1 of Subtitle A of the Internal Revenue Code, including

1 an entity classified as a partnership for tax purposes under Part 10
2 (commencing with Section 17001).

3 (B) A corporation or partnership, if that corporation or
4 partnership immediately after the transfer of the title to the
5 California real property has no permanent place of business in
6 California. For purposes of this subdivision, a corporation or
7 partnership has no permanent place of business in California if all
8 of the following apply:

9 (i) It is not organized and existing under the laws of California.

10 (ii) It does not qualify with the office of the Secretary of State
11 to transact business in California.

12 (iii) It does not maintain and staff a permanent office in
13 California.

14 (2) (A) Except as provided in subparagraph (B), in the case of
15 any disposition of a California real property interest by a transferor
16 described in paragraph (1), the transferee, including for this purpose
17 any intermediary or accommodator in a deferred exchange, is
18 required to withhold an amount equal to $3\frac{1}{3}$ percent of the sales
19 price of the California real property conveyed.

20 (B) If the transferor makes an election under this subparagraph,
21 the transferee, including any intermediary or accommodator in a
22 deferred exchange, is required to withhold an amount equal to an
23 amount certified by the transferor in writing under penalty of
24 perjury. The amount certified shall not be less than the gain
25 required to be recognized under Part 10 (commencing with Section
26 17001) and Part 11 (commencing with Section 23001) on the
27 disposition of the California real property multiplied by the rate
28 specified in either Section 23151 or Section 23186, as applicable,
29 for transferors that are corporations, or the highest rate specified
30 in Section 17041 for transferors other than corporations. For
31 purposes of applying the previous sentence, the following shall
32 apply:

33 (i) The highest rate specified in Section 17041 is determined
34 without regard to any other tax rate specified under Part 10
35 (commencing with Section 17001) irrespective of whether the
36 applicable statute provides that tax shall be treated as if imposed
37 under Section 17041.

38 (ii) For corporations that are “S” corporations subject to the
39 modified tax rate specified in Section 23802, the rate shall be the
40 sum of the rate specified in subdivision (b) of Section 23802 and

1 the highest rate specified in Section 17041, as described in clause
2 (i).

3 (C) (i) The written certification required by subparagraph (B)
4 shall be in a form, as prescribed by the Franchise Tax Board. The
5 form shall provide as follows:

6 “Title and escrow persons and exchange accommodators are not
7 authorized to provide legal or accounting advice for purposes of
8 determining withholding amounts. Transferors are strongly
9 encouraged to consult with a competent tax professional for this
10 purpose.”

11 (ii) The Franchise Tax Board shall make this form available
12 electronically on its Web site in a format that allows a transferor
13 to complete and print the form. The Franchise Tax Board shall
14 also provide electronic means to enable the transferor to estimate
15 the amount of gain required to be recognized by the transferor in
16 the transaction. Any form or worksheet, electronic or otherwise,
17 developed for this purpose shall provide as follows:

18 “Title and escrow persons and exchange accommodators are not
19 authorized to provide legal or accounting advice for purposes of
20 determining withholding amounts. Transferors are strongly
21 encouraged to consult with a competent tax professional for this
22 purpose.”

23 (3) Notwithstanding any other provision of this subdivision, all
24 of the following shall apply:

25 (A) No transferee is required to withhold any amount under this
26 subdivision unless the sales price of the California real property
27 conveyed exceeds one hundred thousand dollars (\$100,000).

28 (B) No transferee, other than an intermediary or an
29 accommodator in a deferred exchange, is required to withhold any
30 amount under this subdivision unless written notification of the
31 withholding requirements of this subdivision has been provided
32 by the real estate escrow person.

33 (C) (i) No transferee, trustee under a deed of trust, or mortgagee
34 under a mortgage with a power of sale is required to withhold
35 under this subdivision when the transferee has acquired California
36 real property at a sale pursuant to a power of sale under a mortgage
37 or deed of trust or a sale pursuant to a decree of foreclosure or has
38 acquired the property by a deed in lieu of foreclosure.

1 (ii) No transferee is required to withhold under this subdivision
2 when the transferor is a bank acting as trustee other than a trustee
3 of a deed of trust.

4 (D) No transferee, including for this purpose any intermediary
5 or accommodator in a deferred exchange, is required to withhold
6 any amount under this subdivision if the transferee, in good faith
7 and based on all the information of which he or she has knowledge,
8 relies on a written certificate executed by the transferor, certifying,
9 under penalty of perjury, one of the following:

10 (i) (I) The California real property being conveyed is the seller's
11 or decedent's principal residence, within the meaning of Section
12 121 of the Internal Revenue Code.

13 (II) The last use of the property being conveyed was use by the
14 transferor as the transferor's principal residence within the meaning
15 of Section 121 of the Internal Revenue Code.

16 (ii) (I) The California real property being conveyed is being
17 exchanged, or will be exchanged, for property of like kind, within
18 the meaning of Section 1031 of the Internal Revenue Code, but
19 only to the extent of the amount of the gain not required to be
20 recognized for California income or franchise tax purposes under
21 Section 1031 of the Internal Revenue Code.

22 (II) Subclause (I) may not apply if an exchange does not qualify
23 for nonrecognition treatment for California income or franchise
24 tax purposes under Section 1031 of the Internal Revenue Code, in
25 whole or in part, due to the failure of the transaction to comply
26 with the provisions of Section 1031(a)(3) of the Internal Revenue
27 Code, relating to the requirement that property be identified and
28 that the exchange be completed not more than 180 days after the
29 transfer of the exchanged property.

30 (III) In any case where clause (ii) applies, the transferee,
31 including for this purpose any intermediary or accommodator in
32 a deferred exchange, is required to notify the Franchise Tax Board
33 in writing within 10 days of the expiration of the statutory periods
34 specified in Section 1031(a)(3) of the Internal Revenue Code and
35 thereafter remit the applicable withholding amounts determined
36 under this subdivision in accordance with paragraph (4).

37 (iii) The California real property has been compulsorily or
38 involuntarily converted, within the meaning of Section 1033 of
39 the Internal Revenue Code, and the transferor intends to acquire
40 property similar or related in service or use so as to be eligible for

1 nonrecognition of gain for California income tax purposes under
2 Section 1033 of the Internal Revenue Code.

3 (iv) The transaction will result in either a net loss or a net gain
4 not required to be recognized for California income or franchise
5 tax purposes.

6 (v) The transferor is a corporation with a permanent place of
7 business in California.

8 (E) (i) In the case of any transaction otherwise subject to this
9 subdivision that qualifies as an “installment sale,” within the
10 meaning of Section 453(b) of the Internal Revenue Code, for
11 California income tax purposes, the provisions of this subdivision
12 shall be separately applied to each principal payment to be made
13 under the terms of the installment sale agreement between the
14 parties.

15 (ii) For purposes of clause (i), subparagraph (A) of paragraph
16 (3) does not apply to each individual payment to be received under
17 the terms of the installment sale agreement.

18 (4) (A) Amounts withheld and payments made in accordance
19 with this subdivision shall be reported and remitted to the Franchise
20 Tax Board in the form and manner and at the time specified by
21 the Franchise Tax Board. Notwithstanding the foregoing, funds
22 withheld on individual transactions by real estate escrow persons
23 may, at the option of the real estate escrow person, be remitted by
24 the 20th day of the month following the close of escrow for the
25 individual transaction, or may be remitted on a monthly basis in
26 combination with other transactions closed during that month.

27 (B) The transferor shall submit a copy of the written certificate
28 and supporting documentation for the reduced withholding
29 specified in subparagraph (B) of paragraph (2) or subparagraph
30 (D) of paragraph (3), executed by the transferor, to the Franchise
31 Tax Board upon request.

32 (5) For purposes of this subdivision, “California real property
33 interest” means an interest in real property located in California
34 and defined in Section 897(c)(1)(A)(i) of the Internal Revenue
35 Code.

36 (6) For purposes of this subdivision, “real estate escrow person”
37 means any of the following persons involved in the real estate
38 transaction:

39 (A) The person, including any attorney, escrow company, or
40 title company, responsible for closing the transaction.

1 (B) If no person described in subparagraph (A) is responsible
2 for closing the transaction, then any other person who receives
3 and disburses the consideration or value for the interest or property
4 conveyed.

5 (7) (A) Unless the real estate escrow person provides
6 “assistance,” it shall be unlawful for any real estate escrow person
7 to charge any customer for complying with the requirements of
8 this subdivision.

9 (B) For purposes of this paragraph, “assistance” includes, but
10 is not limited to, helping the parties clarify with the Franchise Tax
11 Board the issue of whether withholding is required under this
12 subdivision or, upon request of the parties, withholding an amount
13 under this subdivision and remitting that amount to the Franchise
14 Tax Board.

15 (C) For purposes of this paragraph, “assistance” does not include
16 providing the written notification of the withholding requirements
17 of this subdivision.

18 (D) In a case where the real estate escrow person provides
19 “assistance” in complying with the withholding requirements of
20 this subdivision, it shall be unlawful for the real estate escrow
21 person to charge any customer a fee that exceeds forty-five dollars
22 (\$45).

23 (8) For purposes of this subdivision, “sales price” means the
24 sum of all of the following:

25 (A) The cash paid, or to be paid, but excluding for this purpose
26 any stated or unstated interest or original issue discount, as
27 determined under Sections 1271 through 1275, inclusive, of the
28 Internal Revenue Code.

29 (B) The fair market value of other property transferred, or to be
30 transferred.

31 (C) The outstanding amount of any liability assumed by the
32 transferee or to which the California real property interest is subject
33 immediately before and after the transfer.

34 (9) The Franchise Tax Board may prescribe, by forms,
35 instructions, published notices, or regulations, any requirements
36 necessary for the efficient administration of this subdivision
37 relating to the treatment of “de minimis” amounts otherwise
38 required under this section.

39 (10) (A) *Notwithstanding any other law, in the case of any*
40 *disposition of a California real property interest in taxable years*

1 *beginning on or after January 1, 2016, if not otherwise exempt,*
2 *withholding is not required under this section if a transferor makes*
3 *an election under this paragraph to remit any tax due with the*
4 *filing of any tax return required by this part.*

5 *(B) The election shall be made in a written form, as prescribed*
6 *by the Franchise Tax Board. The Franchise Tax Board may*
7 *prescribe, by forms, instructions, published notices, or regulations,*
8 *any requirements necessary for the efficient administration of this*
9 *paragraph, including the timing of making the election.*

10 (f) Withholding is not required under this section with respect
11 to wages, salaries, fees, or other compensation paid by a
12 corporation for services performed in California for that corporation
13 to a nonresident corporate director for director services, including
14 attendance at a board of directors' meeting.

15 (g) In the case of any payment described in subdivision (f), the
16 person making the payment shall do each of the following:

17 (1) File a return with the Franchise Tax Board at the time and
18 in the form and manner specified by the Franchise Tax Board.

19 (2) Provide the payee with a statement at the time and in the
20 form and manner specified by the Franchise Tax Board.

21 (h) (1) The amendments to this section made by Chapter 488
22 of the Statutes of 2002 apply to dispositions of California real
23 property interests that occur on or after January 1, 2003.

24 (2) In the case of any payments received on or after January 1,
25 2003, pursuant to an installment sale agreement relating to a
26 disposition occurring before January 1, 2003, the amendments to
27 this section made by Chapter 488 of the Statutes of 2002 do not
28 apply to those payments.

29 (i) (1) The amendments made to this section by the act adding
30 this subdivision shall apply to dispositions of California real
31 property interests that occur on or after January 1, 2009.

32 (2) In the case of any payments received on or after January 1,
33 2009, pursuant to an installment sale agreement relating to a
34 disposition occurring before January 1, 2009, the amendments
35 made to this section by the act adding this subdivision do not apply
36 to those payments.